IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 11, 2007 Session

IN RE A.T.P., C.IG., D.P., & A.V.P. II

Appeal from the Circuit Court for Franklin County
No. 15331 Thomas W. Graham, Judge

No. M2006-02697-COA-R3-JV - Filed January 10, 2008

Father appeals the trial court's ruling declaring his four children to be dependent and neglected and argues that the trial court's finding that he committed severe child abuse was not supported by clear and convincing evidence. Father also contends that the trial court abused its discretion by not granting his motions for a new trial upon the ground that newly discovered evidence will alter the trial court's decision and upon the further ground that the trial court failed to appoint a preference guardian ad litem in compliance with Tenn. S. Ct. R. 40(e). After careful review, we conclude that the record contains clear and convincing evidence that Father committed severe child abuse, and that the trial court did not abuse its discretion in denying Father's motions for a new trial. Accordingly, the judgments of the trial court are affirmed in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Michelle Benjamin, Winchester, Tennessee, for the appellant, A.P.

Robert E. Cooper, Jr., Attorney General & Reporter; Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I. Background

In late May of 2005, B.S.P. was hospitalized for what she asserts was depression. At the time, she and her husband, A.P. (hereinafter "Father"), from whom she was then legally separated, had custody of four children: C.I.G. (DOB 01/22/98), the biological child of B.S.P. and S.J., Jr.[1]; A.T.P. (DOB 03/18/01) and D.P. (DOB 09/19/97), the biological children of Father and S.C.[2]; and A.V.P. II (DOB 11/05/03), the biological child of Father and B.S.P. During B.S.P.'s hospitalization, A.T.P. and D.P. were in the care of Father while the other two children, C.I.G and A.V.P.II, were in the care of their maternal grandmother. At some point during this period of time, it appears that B.S.P. made statements to hospital staff indicating that she and Father had sexually abused A.T.P. The hospital notified the Department of Children's Services (hereinafter "DCS") of these allegations, and on May 25, 2005, DCS filed a petition for temporary custody of A.T.P. and D.P., pending further investigation of the matter. An order was promptly entered by the Franklin County juvenile court, finding that there was probable cause to believe that A.T.P. and D.P. were dependent and neglected and placing them in the temporary custody of their paternal grandmother. Shortly thereafter, B.S.P.'s mother, L.G., filed a petition for temporary custody of C.I.G. and A.V.P. II, and the juvenile court granted L.G. custody of those two children.

After being discharged from the hospital in early June of 2005, B.S.P. was interviewed by DCS case manager Tammy Cronan and Franklin County Sheriff's Department investigator, Jennifer Grubbs, at the apartment of B.S.P.'s father. Ms. Cronan testified as follows that during the interview, B.S.P. indicated that she and Father had on separate occasions between January and February of 2005, engaged in sexual activity with both A.T.P. and N.R., a five year old female child unrelated to either parent who was spending the evening at their home:

> [B.S.P.] stated that [Father] had made her participate in threesomes with his friends and that he was doing a lot of drugs and watching pornography constantly on the computer or on the TV. And that there was an incident involving a little girl named [N.R.] and that the child had spent the night with them and that the kids were all in - - all the boys and all the kids were in the bedroom and the little girl was in the bedroom too and that [B.S.P.] had gone into the bathroom and put on a black nighty that [Father] had bought her and she came out and that he had wanted [N.R.] to come in there and that the child was brought into the bedroom and that [Father] was rubbing his penis on the child and that some of the pre-ejaculate - - she called it prenutting - - that he had put it on the outside of the child's panties and they pulled it down and then he had done that again on top of the child's vaginal area and that he had licked it - - he licked the child's vaginal area and

[1] S.J., Jr. is not a party to this appeal.

[2] S.C. is not a party to this appeal.

> told her to lick it and then said to her something along the lines of it tastes good doesn't it. And then she said she felt feelings of guilt and shame and disgust. And he then wanted to have sexual intercourse and she said she refused and went out on the couch or love seat into the other room and then let - - the child was alone with him for a while and then they went back into the - - and then eventually she went back into the bedroom.
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> . . .
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> And then there was another incident involving [A.T.P.], which is the biological child of [Father] and [S.C.], and that - - which would be a stepchild to [B.S.P.] - - and that there was an incident where the child was in their bed and that [Father] had allegedly said I want to see you doing it or having sexual intercourse with the child, that he had her get on top of the child, that he held the child's penis and was moving his fingers up and down on the child's penis, and that she described it as an attempt to jack him off, and that prior to that he had told her to perform oral sex on the child and that she did and that the child woke up and they kind of shush, shush, go back to sleep. And that had - - that was part of it. And that she had said that she wasn't - - didn't want to do it, but that there was some sort of weapon, a tall gun, wasn't sure if it was a rifle or shotgun that he kept in the closet that she was afraid of.

Ms. Cronan's testimony was corroborated by case notes she made at or near the time of the interview and the following testimony of Officer Grubbs based upon notes Officer Grubbs also made at or near the time of the interview:

> [This] is in reference to one evening when [B.S.P.] was at home with [Father] and it says that, [B.S.P.] further stated that the house had three bedrooms but that they only used two of the bedrooms and that all of the kids stayed in the same room. On this particular evening, [B.S.P.] stated that [Father] put a porno tape in the VCR. [B.S.P.] further stated that she and [Father] begin talking about their past so that in her words they would be closer. [B.S.P.] then got up and put on a black nighty that [Father] had bought for her. [Father] wanted [N.R.] to come across to their room. So [B.S.P.] went and got her from [C.I.G's] bed and laid [N.R.] on the edge of her's and [Father's] bed. [B.S.P.] stated that she got on the bed and that [Father] got on his knees and told [B.S.P.] to stay by [N.R.'s] body. [Father] rubbed his penis on [N.R.'s] butt while [N.R.] was lying on her side. According to [B.S.P.], he prenutted on her pants. [N.R.] still had her clothes on at this time and that [Father] continued to do this for a while. [Father] then took his left leg and straddled her, pulled down

> her flannel pants and panties and prenutted on [N.R.'s] vagina from the top of her clit down. [B.S.P.] further stated that [Father] soaked her, then went down and tasted it, and then B.S.P. had to come on and taste it too. [B.S.P.] then stated that she did taste it and at that point [Father] commented that it tasted good. [Father] then pulled [N.R.'s] flannel pants back up and then turned around and started watching the porno movie again and stated that he wanted to have sex and [B.S.P.] said no. She got up and left the room.
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> . . .
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> [B.S.P.] stated the following incident took place on a school night around 10:30 p.m. [Father] went and got [A.T.P.] out of the bed and laid down on their full sized bed completely naked while [B.S.P.] was in the bathroom. Father told her that he wanted to do it with [A.T.P.]. [Father] stated that he wanted her to suck his little dick. After a while [Father] told her to get on top of him -- [A.T.P.] -- and [Father] put [A.T.P.'s] dick inside [B.S.P.] and started jacking it in reference to [A.T.P.'s] penis inside of her. [A.T.P.] woke up and [Father] told [A.T.P.] that mommy and daddy were just checking his pee pee. Finally, [Father] said get up because he's not going to ejaculate.

After a subsequent adjudicatory hearing in late August of 2005, the juvenile court found that there was clear and convincing evidence that the four children were dependent and neglected based upon "the totality of the circumstances" and awarded DCS temporary custody. Father appealed this ruling to the circuit court.

The case was tried de novo in circuit court on March 7, 2006, at which time the trial court heard the testimony of various witnesses. In addition to B.S.P. and Father, these witnesses included DCS case manager Cronan, and Officer Grubbs. Both Ms. Cronan and Officer Grubbs recounted the interview they conducted with B.S.P. regarding her allegations of sexual abuse as set forth above, and Officer Grubbs also testified regarding a taped interview she conducted of B.S.P. on August 18, 2005. At trial, Father denied the allegations of sexual abuse, and B.S.P. recanted her prior statements, insisting that she had no memory of any incidents of sexual abuse of children by either herself or Father and that when she made the cited statements she was experiencing a mental breakdown and was delusional and hallucinating. The trial court's order entered March 13, 2006, included the following:

> The basis of the State's claim is that [Father], the father of [A.T.P.] and [B.S.P.], the mother of [A.T.P.], are unfit to properly care for [A.T.P., D.P., C.I.G., and A.V.P. II] due to the sexual abuse they committed on [A.T.P.] and another minor child, not a member of the family. The State further asks that the Court find the actions of the parents as to [A.T.P.] be determined to be "severe child abuse."
>
> FINDINGS

> This case depends almost entirely on the Court's determination of the credibility of [Father] and [B.S.P.] More specifically, the case turns on the weight to be given the statements against interest made by [B.S.P.] as described by Tammy Cronan, Case Manager, Franklin County, Tennessee Department of Children's Services which are further set forth in the case notes she took in early June of 2005 and the August statements against interest of [B.S.P.] described by Investigator Jennifer Grubbs, which statements were further presented to the Court in the form of a[n] audio tape recording made at the time of the statement. At trial, [Father] denied any improper conduct had occurred and further described his marriage as not abnormal to any substantial degree. [B.S.P.] at trial claimed a lack of any memory of the two statements and denied any improper conduct. The Court finds an almost total lack of credibility in the trial statements of [Father] and [B.S.P.]. [Father's] testimony was undermined at trial by other witnesses and by the totality of the circumstances as revealed by the evidence. Moreover, [Father's] over confident demeanor while testifying supported the picture painted by [B.S.P.] in her June and August statements as being controlling and demanding. As to [B.S.P.], her loss of memory based on her claimed mental breakdown follows exactly the scenario urged upon her by her husband as described in her previous statements. Finally, this Court has listened closely to the taped statement given to Investigator Grubbs. This August statement is consistent with the statement she previously gave to Tammy Cronan and reveals a person who is both alert and rational.
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> CONCLUSION
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> Based upon the above this Court finds by clear and convincing evidence:
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> (1) That [Father] and [B.S.P.] did engage in severe child abuse of [A.T.P.] in violation of Tennessee Code Annotated § 37-1-129(a)(2) and Tennessee Code Annotated § 37-1-102(b)(21)(C) by sexually abusing said child by committing fellatio and other abuse acts.
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> (2) That due to the above finding the children of said adults, to-wit: [C.I.G.], [A.V.P. II], [A.T.P.], and [D.P.] are declared to be dependent and neglected children pursuant to T.C.A. § 37-1-102(b)(12)(B),(F) and (G).
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> (3) Custody of these children shall remain with the Department of Children's Services.

Thereafter, Father filed motions to alter or amend the above judgment or in the alternative

motions for new trial. As grounds, Father asserted, inter alia, that the judgment was not supported by clear and convincing evidence; that, pursuant to Tenn. S. Ct. R. 40(e), a preference guardian ad litem should have been appointed to represent A.V.P. II and D.P. because they expressed a preference contrary to the position advocated by the guardian ad litem; and that new evidence was available to show that behavioral difficulties of A.T.P. were the result of fragile x syndrome and ADHD rather than sexual abuse. By subsequent order entered November 15, 2006, the trial court denied all of these motions except that the trial court ruled as follows as to failure to appoint a preference guardian ad litem:

> With regard to the failure to appoint an additional attorney to advocate the children's preferences, the Court agrees Rule 40(e) appears not to have been fully followed. The Court will therefore hold a further hearing should it appear the children's preference is to return to their home. In this regard the Court appoints Attorney Joseph S. Bean, Jr. to advocate pursuant to Rule 40(e) if he deems a hearing is required. Any such hearing would be limited to the question of whether the children should be returned to the home of the parents but not as to the original findings of this Court. This Rule 40(e) hearing will not re-litigate the findings of the Court that the child, [A.T.P.], has been sexually abused.

The record does not show that any further hearings were requested or held, and on December 13, 2006, Father filed timely notice of appeal.

II. Issues

The following issues are presented for our review:

1) Whether there was clear and convincing evidence to support the trial court's finding of dependency and neglect.

2) Whether the trial court erred in denying Father's motion for a new trial upon the ground that a preference guardian ad litem was not appointed to represent the interests of A.T.P. and D.P.

3) Whether the trial court erred in denying Father's motion for a new trial upon the ground of newly discovered evidence with respect to behavioral problems of A.T.P.

III. Analysis

A. Standard of Review

In a non-jury case such as this one, we review the record de novo with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the

evidence preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide v. Huddleston,*** 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to either as to the trial court's factual findings. ***Seals v. England/Corsair Upholstery Mfg. Co., Inc.,*** 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are reviewed de novo and are accorded no presumption of correctness. ***Campbell v. Florida Steel Corp.,*** 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett,*** 860 S.W.2d 857, 859 (Tenn. 1993). As provided by statute, a finding of dependency and neglect must be based upon clear and convincing evidence. Tenn. Code Ann. § 37-1-129. Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, ***State v. Demarr,*** No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., filed Aug. 13, 2003), *no appl. perm. filed,* and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. ***In re Valentine,*** 79 S.W.3d 539, 546 (Tenn. 2002); ***In re S.M.,*** 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); ***In re J.J.C.,*** 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. ***In re A.D.A.,*** 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); ***Ray v. Ray,*** 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); ***In re C.W.W.,*** 37 S.W.3d at 474. In the context of the clear and convincing standard, we first review the trial court's specific findings of fact which are presumed to be correct unless the evidence preponderates against them. We then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for a finding of dependency and neglect. *See* ***In re S.M.,*** 149 S.W.3d 632, 640 (Tenn. Ct. App. 2004) (discussing same standard in case involving the termination of parental rights).

As to the trial court's denial of Father's motions for a new trial, it is well settled that a trial court's decision regarding whether to grant or deny such a motion is a matter of discretion, and its decision in that regard will not be disturbed unless it constitutes an abuse of discretion. ***Ali v. Fisher***, 145 S.W.3d 557, 564 (Tenn. 2004). And, as the high Court of this state has recently restated,

> a trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999) (quotation and citation omitted). The abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court. *See* ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998).

Williams v. Baptist Memorial Hosp., 193 S.W.3d 545, 551 (Tenn. 2006).

B. Clear and Convincing Evidence

The first issue we address is whether the trial court's finding of dependency and neglect was supported by clear and convincing evidence.

As stated in its order, the trial court found the four children in this case to be dependent and neglected pursuant to Tenn. Code Ann. § 37-1-102(b)(12)(B), (F), and (G) wherein a "dependent and neglected child" is respectively defined as a child,

> (B) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;
>
> . . .
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> (F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others;
>
> (G) Who is suffering from abuse or neglect.

The trial court's finding of dependency and neglect was in turn based upon its primary finding that Father committed severe sexual abuse of A.T.P. and N.R. under Tenn. Code Ann. § 37-1-102(b)(21)(C) which defines "severe child abuse" to include the following:

> The commission of any act towards the child prohibited by §§ 39-13-502 – 39-13-504 [aggravated sexual battery], 39-13-522 [rape of a child], 39-15-302 [incest], and 39-17-1005 [especially aggravated sexual exploitation of a minor] or the knowing failure to protect the child from the commission of any such act towards the child.

Father contends that "[t]he Court based its finding of clear and convincing evidence of sexual abuse upon [B.S.P.'s] statement, which originated while in a psychiatric hospital suffering with hallucinations and delusions and the subsequent statement to the DCS worker and law enforcement officer, and all occurring within the period while she was recovering from an emotional breakdown." Alternately stated, Father's argument appears to be that the trial court was precluded from relying upon statements made by B.S.P. wherein she indicated that she and Father had sexually abused A.T.P. and N.R. because at the time she made such statements, B.S.P. was not lucid and the statements are therefore inherently unreliable and accordingly, do not constitute clear and convincing evidence. This argument is without merit.

As a preliminary matter, we note that the exact content of statements B.S.P. made to hospital staff during her hospitalization is not in evidence, and there is no indication that the trial court relied upon such statements in reaching its conclusions in this matter. It is sufficient to note, and undisputed, that these statements, whatever their content, were communicated to DCS and prompted further investigation by that agency. With respect to subsequent statements B.S.P. made during her interview by Ms. Cronan and Officer Grubbs in early June of 2005 and later during her interview by Officer Grubbs alone on August 18, 2005, we find no competent proof that B.S.P. was delusional

and hallucinatory or otherwise incompetent at the time she made such statements or that the trial court improperly relied upon such statements in reaching its decision.

At trial, B.S.P. did not deny making the previously noted statements of sexual abuse testified to by Officer Grubbs and Ms. Cronan with respect to their interview of her in early June of 2005. Both Officer Grubbs and Ms. Cronan testified as to B.S.P.'s demeanor at the time of that interview. Officer Grubbs testimony in that regard was as follows:

> Q. Let me ask you about [B.S.P.'s] demeanor. Did she appear lucid?
>
> A. Yes, she did.
>
> Q. Did you notice anything in your professional training, anything out of the ordinary with her as far as responding or anything other than just individual quarks that different people have? Anything that caused you concern or anything of that magnitude?
>
> A. No.
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> THE COURT: Were you aware that she had been in an institution because of mental instability?
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> THE WITNESS: Yes, sir.

This testimony of Officer Grubbs was corroborated by the following testimony of Ms. Cronan:

> Q. What was [B.S.P.'s] demeanor? How did she appear to you? Did you see anything that just caught you as out of the ordinary or abnormal?
>
> A. No. She seemed appropriate. Sometime she was tearful. Sounded angry at a couple of points, but for the most part, you know, she wasn't real - - there wasn't anything that was setting off red flags.
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> . . .
>
> She had told me she was - - and I'm sorry, I don't have the list of what she had with her. She had told me she was on medication and that, you know, she was released from the hospital and was feeling better.
>
> . . .

> THE COURT: Ms. Cronan, at any time with your discussions with [B.S.P.] did she appear to you to be disoriented or delusionary?
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> THE WITNESS: No sir. She was oriented to time, date, place, where she was. She appeared lucid. I used to work with the chronically mentally ill. So like I said, I didn't observe any red flags that would make me think that. There was no break in thought or there was no hint of paranoia.
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> . . .
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> THE COURT: And your opinion, based on that experience, was that [B.S.P.] was not unbalanced or delusionary at the time you were interviewing her about these events?
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> THE WITNESS: That's correct.

While B.S.P. attested at trial that she could not remember what she stated during the interview, that when the interview took place she was delusional, and that the statements she is alleged to have made during the interview were not true, the trial court found that her trial testimony was not credible. Other than B.S.P.'s own testimony, Father presented no evidence as to B.S.P's mental competency at the time of her interview by Ms. Cronan and Officer Grubbs in early June of 2005. In fact, other than the testimony of Father and B.S.P., both of whom the trial court found were not credible witnesses, there was absolutely no evidence presented that B.S.P. was mentally incapable of responding accurately when questioned at any time relevant to this case. We also note that Officer Grubbs interviewed B.S.P. again on August 18, 2005, and attested that during the course of that interview, B.S.P. indicated that Father had suggested to her the alibi of mental incompetency:

> [B.S.P.] stated to me during this conversation that she loved [Father], that she went on to say that he had told her that no matter what, she couldn't tell anybody what had happened and that she could claim that she was temporarily insane.
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> . . .
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> Q. That was to be utilized as the excuse?
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> A. This is what she stated to me.
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> . . .
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> She led me to believe that [Father] was trying to convince her to change her story and say that she was crazy when she made these

allegations.

We have noted that we accord considerable deference to a trial court's factual finding based upon witness testimony. As we recently stated in ***Lovell v. Lovell***, No. M2005-02955-COA-R3CV, 2007 WL 34826, at *3 (Tenn. Ct. App. M.S., filed January 4, 2007),

> [W]hen the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *See* ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412, 415 (Tenn. 1995); ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be give great weight by the appellate court. *See* ***id.;*** *see also* ***Walton v. Young***, 950 S.W. 2d 956, 959 (Tenn. 1997).

Quite simply, the trial court adjudged the trial testimony of Ms. Cronan and Officer Grubbs to be credible and the trial testimony of Father and B.S.P. to be not credible and ruled accordingly. After review, we find that the record supports the trial court's finding that the cited pre-trial statements that B.S.P. made to Officer Grubbs and case manager Cronan constituted clear and convincing evidence that Father committed severe sexual abuse against children in his care.

Father also argues that there was a failure of proof in this case because DCS did not present expert testimony in accordance with Tenn. Code Ann. § 37-1-102(b)(21)(B) which sets forth one definition of "severe child abuse" as follows:

> (B) Specific brutality, abuse or neglect towards a child that in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe development delay or retardation, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct.

In view of the fact that the trial court determined that Father engaged in severe child abuse as defined by subsection (C) of the statute, rather than subsection (B), and in the absence of any authority holding that expert testimony is a prerequisite to a finding of severe child abuse under subsection (C), Father's argument is without merit.

C. Preference Guardian Ad Litem

Next, Father contends that the trial court abused its discretion in failing to grant his motion for a new trial because of an asserted failure to comply with Tenn. S. Ct. R. 40(e) which provides in pertinent part as follows:

> (1) If the child asks the guardian ad litem to advocate a position that the guardian ad litem believes is not in the child's best interest, the guardian ad litem shall:
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> > (i) Fully investigate all of the circumstances relevant to the child's position, marshal every reasonable argument that could be made in favor of the child's position, and identify all the factual support for the child's position;
> >
> > (ii) Discuss fully with the child and make sure that the child understands the different options or positions that might be available, including the potential benefits of each option or position, the potential risks of each option or position, and the likelihood of prevailing on each option or position.
>
> (2) If, after fully investigating and advising the child, the guardian ad litem is still in a position in which the child is urging the guardian ad litem to take a position that the guardian ad litem believes is contrary to the child's best interest, the guardian ad litem shall pursue one of the following options:
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> > (i) Request that the court appoint another lawyer to serve as guardian ad litem, and then advocate for the child's position while the other lawyer advocates for the child's best interest.
> >
> > (ii) Request that the court appoint another lawyer to represent the child in advocating the child's position, and then advocate the position that the guardian ad litem believes serves the best interests of the child.

Father contends that "[t]he trial court should have granted a new trial and appointed an attorney to advocate the 'urgings' of the children to be in the home of their parents." Father relies upon testimony of clinical psychologist Dr. Bethany Lohr who saw A.T.P. and D.P. after those two children were removed from the custody of Father. Inter alia, Dr. Lohr attested that the children "were upset that they couldn't stay with their father and they didn't understand why." While this testimony may constitute evidence that these two children expressed a preference to Dr. Lohr that they be returned to Father, Father has presented no evidence that any of the four children found to be dependent and neglected in this case asked the guardian ad litem that they be returned to Father or otherwise advocated a position that was not in the child's best interest as is required to trigger Rule 40. Accordingly, we do not find that the trial court abused its discretion by failing to grant Father's motion for a new trial on this ground. Furthermore, the preference of a child as to where he or she will live or a child's position as to what is in his or her best interest is not relevant to the

question of whether severe child abuse has been committed, and therefore, the appointment of a preference guardian ad litem would have no effect on the factual finding that led to the dependency and neglect ruling in this matter. And finally, as we have noted, responding to Father's motion in its order of November 15, 2006, the trial court stated that it would hold an additional hearing should it appear that the children's preference was to return to their home, and the trial court appointed an attorney to advocate as preference guardian ad litem pursuant to Rule 40(e) if the preference guardian ad litem deemed that an additional hearing was required.[3] The record does not show that an additional hearing was requested by this preference guardian ad litem, and there being no proof to the contrary, we must necessarily assume that his investigation indicated that such was unwarranted. In light of this, we must conclude that the trial court's failure to appoint a guardian ad litem prior to the hearing on March 7, 2006, was, in any event, harmless error.

D. New Evidence

Finally, Father contends that the trial court abused its discretion because it failed to grant him a new trial based upon allegedly newly discovered evidence. In this regard, Father asserts that following the March 7, 2006 hearing, Amy Evans, MD, performed testing on A.T.P. and determined that he suffers from fragile x syndrome, which is asserted to be a common genetic cause of mental retardation and attention deficit hyperactivity disorder (ADHD). Father states that at trial, a foster care worker testified that behavioral problems exhibited by A.T.P. indicated that he had been the victim of sexual abuse. Father argues that Dr. Evans's testimony will show that such behavioral problems are actually caused by fragile x syndrome and ADHD and that such evidence is "material and likely to change the result of the trial if reasonably accepted by the trial court." We do not agree that the trial court abused its discretion by failing to grant Father a new trial on this ground.

As we have discussed, the cited statements of B.S.P. constituted clear and convincing evidence that Father engaged in the sexual abuse of children in his care, and the trial court's decision was sufficiently supported by that evidence in the absence of any other. As the trial court stated in its November 15, 2006 order denying Father a new trial on this ground of newly discovered evidence, "[w]ith regard to the newly discovered evidence, the Court finds no basis to reopen the proof since the issue of whether or not the observed conduct of [A.T.P.] is indicative of sexual abuse even if disproved would not cause this Court to doubt its original finding that severe child abuse had been proven by clear and convincing evidence." We agree with the trial court's rationale for denying Father's motion for a new trial and find no abuse of discretion in that regard.

IV. Conclusion

For the foregoing reasons, we affirm the judgments of the circuit court. Costs of appeal are assessed to the appellant, A.P.

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[3]The trial court's appointment of this preference guardian ad litem for future proceedings is consistent with Tennessee statutory law prohibiting the return of a child who was the victim of severe child abuse to "the custody or residence of any person who engaged in or knowingly failed to protect the child from the . . . abuse" absent further specific findings of the trial court based upon reports and recommendations of the commissioner of children's services. Tenn. Code Ann. § 37-1-130(c), (d).

SHARON G. LEE, JUDGE